BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Developing a Unified Intercarrier Compensation Regime	))	CC Docket No. 01-92

COMMENTS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

October 24, 2006

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The Public Service Commission of the State of Missouri ("MoPSC") offers the following comments in response to the Federal Communication Commission's ("Commission") Public Notice seeking comment on an intercarrier compensation reform plan ("Plan") filed July 24, 2006 by the National Association of Regulatory Utility Commissioners' Task Force on Intercarrier Compensation ("NARUC Task Force"). The MoPSC commends the NARUC Task Force for its efforts and appreciates the opportunity to have had active involvement in the task force process.

The Executive Summary of the Plan states, "The Plan is a significant step forward in reforming yesterday's regulations – designed for the legacy narrowband world – to accommodate today's intermodal, competitive, and increasingly Internet-oriented communications environment." As a result of the issues facing today's "environment", the Commission has several outstanding Notices of Proposed Rulemaking: IP-enabled services; USF contribution methodologies; and USF reform. These are all interrelated and must be addressed in order to provide a comprehensive solution to the issues. The MoPSC encourages the Commission to take this opportunity to consider comments in these related dockets[1] in an effort to provide a uniform resolution to the many related, complex issues. The Plan purports to address many issues facing the Commission, state commissions and the industry; however, the MoPSC finds several areas of the Plan that need further refining or cause concern. These comments discuss several areas of concern.

I. MOPSC EXECUTIVE SUMMARY

The MoPSC supports an intercarrier compensation regime that is consistent with the principles established by the National Association of Regulatory Utility Commissioners ("NARUC") Study Committee on Intercarrier Compensation. In other words, the regime should be technologically and competitively neutral; be economically sound; maintain appropriate jurisdictional authorities; minimize the impact on the federal Universal Service Fund; minimize rate shock to end-users; be achievable, simple and inexpensive to administer and include proper cost analysis and justification. The Plan fails to meet most, if not all, NARUC principles.

[1] Notice of Proposed Rulemaking. *In the Matter of IP-Enabled Services*. WC Docket 04-36. Released March 10, 2004; Public Notice. *In the Matter of Federal-State Joint Board on Universal Service*. CC Docket 96-45. Released February 26, 2003. Notice of Proposed Rulemaking. *In the Matter of Comprehensive Review of Universal Service Fund Management, Administration, and Oversight.* WC Docket 05-195, et al. Released June 14, 2005; Public Notice. *In the Matter of Federal-State Joint Board on Universal Service.* CC Docket 96-45. Released August 17, 2005.

The Plan is extremely complex and moves intercarrier compensation rates to a "unified" level in a manner that can only be described as "too much, too fast". Carriers are divided into "Tracks" based on incumbent access line revenue. Depending on the Track, intercarrier compensation is transitioned over a three year period to interstate access rate levels or lower. The Plan guarantees revenue neutrality by shifting $6 billion in access charge reductions to end user rates. The Plan inappropriately allows carriers to recover lost revenues from sources typically portrayed as "governmentally authorized or allowed". End-user rates are further affected since, under the Plan, an already unsustainable USF is estimated to increase by approximately 32 percent based on the Plan's components.

Many areas of the Plan remain vague or undeveloped. Similarly, the cost justification for the Plan is either flawed or inadequate. Such deficiencies make it difficult to provide full analysis of the Plan and the affect on the industry and end-users.

Having concluded that there is an urgent need to reform the existing intercarrier compensation rules, the Commission, in its Further Notice of Proposed Rulemaking (FNPRM) released in this case on March 3, 2005, sought comment on the reforms that best serve the identified goals of economic efficiency and investment, development of competition, preservation of universal service, and competitive and technology neutrality. The Plan fails to meet the stated objectives.

Finally, the Plan preempts state authority in many areas and reverses several Commission, state commission and court decisions that are inconsistent with the proponents' positions on issues related to the appropriate application of reciprocal compensation versus access charge compensation. The Commission does not have authority to adopt the Plan because it imposes federal rules in areas that are the subject of direct authority to the states under the Telecommunications Act of 1996 ("Act").

In short, the Plan fails to meet the objectives of the Act, the Commission and the NARUC principles. Therefore, in accordance with previously filed comments, the MoPSC supports the NARUC Plan[2] and urges the Commission to consider it in lieu of the intercarrier compensation plan filed on June 24, 2006 that is the subject of this request for comment.

II. NARUC PRINCIPLES

The National Association of Regulatory Utility Commissioners Study Committee on Intercarrier Compensation established goals for a new intercarrier compensation system ("NARUC principles"). The NARUC principles "address the design and functioning of, and the prerequisites to, a new intercarrier compensation plan"[3] through eight general principles: A) Applicability; B) Economically Sound; C) Competitive Intercarrier Markets Not Price-Regulated; D) Non-competitive Intercarrier Markets Price-Regulated; E) Appropriate Federalism; F) Universal Service and Consumer

[2] NARUC proposal filed May 18, 2005.

[3] NARUC principles filed May 5, 2004.

Protection; G) Achievability and Durability; and H) Prerequisites for Plan Implementation. These general principles are discussed in more detail below with specific comments as to how the Plan approaches each principle.

A. Applicability

> 1. An integrated intercarrier compensation plan should encompass rates for interconnecting CLEC and ILEC local traffic as well as access charges paid by IXCs;
> 2. CLECs, IXCs, ISPs, VoIP, wireless, and any other companies exchanging traffic over the PSTN should be covered by the Plan ("covered entities").
> 3. No covered entity should be entitled to purchase a service or function at local rates as a substitute for paying intercarrier compensation.

The Plan appears to meet the Applicability principles by providing an intercarrier compensation plan for all types of traffic that traverse the public switched telephone network ("PSTN").

B. Economically Sound

1. The Plan should minimize arbitrage opportunities and be resistant to gaming.
2. The Plan should be designed to recover an appropriate portion of the carrier's applicable network costs, including compliance with jurisdictional separations and cost allocation rules.
3. Charges should not discriminate among carriers based on classification of the carrier, classification of the carrier's customers, the location of the carrier's customers, the geographic location of any end-uses who are parties to the communication, the architecture or protocols of a carrier's network or equipment.
4. The Plan should be competitively and technologically neutral and reflect underlying costs.
5. The Plan should encourage competition by ensuring that carriers have an economic incentive to interconnect, to carry the traffic, and to provide high-quality service.
6. Volume of use should be considered when setting intercarrier compensation rates.
7. Any Plan should be simple and inexpensive to administer.

The Plan fails to meet several of the "economically sound" principles. The Plan attempts to charge the same rates for the same services, so opportunities for arbitrage should be reduced. However, instead of establishing a "unified" rate for all carriers and all traffic, the Plan establishes different rate schedules based on the number of incumbent access lines. Absent a unified rate for all carriers and all traffic, the MoPSC suggests opportunities for arbitrage and gaming will still exist. Since all carriers, regardless of technology, will be charged the same rate for the origination and termination of traffic within a given track, the plan attempts to achieve technological neutrality. However, since all competitors, regardless of technology or classification of the competing ILEC, are considered Track 1 carriers, technological neutrality is not achieved.

Given the rate structure methodology, which ultimately drives interstate and intrastate rates to a given level, jurisdictional separations issues may be moot unless a state chooses to not participate in the plan. However, a mechanism to properly allocate costs and revenues must be provided in order to calculate such things as state assessments tied to jurisdictional revenues.

Since the plan rates are "default" rates, carriers are provided the opportunity to negotiate rates. The MoPSC questions the practical application of this premise. In other words, what incentive does a carrier that supports the default rates have to negotiate if it is guaranteed the default rates anyway? It is not clear that the Plan will produce economic incentives for carriers to interconnect at rates other than those in the plan.

Finally, the Plan is not simple. The concept is simple but the construct, application and administration of the Plan are complex and potentially costly for certain segments of the industry.

C. Competitive Intercarrier Markets Not Price-Regulated

1. Market-based rates should be used where the market is deemed competitive.

Since the rates are determined by ILEC access lines, and not the competitive nature of the market, the Plan fails to meet this objective. Further, since the subscriber line charge ("SLC") can be deaveraged under the Plan, the MoPSC contends the Plan actually provides an incentive for carriers to charge a higher SLC in non-competitive areas; thus subsidizing rates in competitive markets.

D. Non-Competitive Intercarrier Markets Price-Regulated

> 1. Plan should ensure that telecommunications providers have an opportunity to earn a reasonable return and maintain high-quality service. The Plan should encourage innovation and promote development of competitive markets.
> 2. Government should limit the ability of carriers with market power to impose excessive charges.
> 3. Where charges are restricted by government action, carriers have the protection of due process, and confiscation is not permitted.
> 4. If any ILEC property or operations in the future could give rise to confiscation claim, in a rate case or otherwise, then a practical way should be defined to exclude property and operations in competitive markets.

Once again, since the Plan does not distinguish between competitive and non-competitive markets, it is difficult to state that the Plan meets the "Non-Competitive Intercarrier Markets Price-Regulated" principles. Incumbent telecommunications providers will have the same opportunity as today to earn a reasonable return since the Plan guarantees full revenue recovery and does not require any sort of audit or true-up of carrier revenues. However, it is doubtful a "government" agency will be in the position to limit the ability of carriers with market power to impose excessive charges since the Plan anticipates preemption of state authority with respect to intercarrier compensation.

E. Appropriate Federalism

> 1. The Plan should ensure that revenues, cost assignment, and the risk of confiscation are jurisdictionally consistent for all classes of traffic.

2. State commissions should continue to have a significant role in establishing rates and protecting and communicating with consumers.
3. The FCC should have the authority to pool costs within its defined jurisdiction whenever intercarrier compensation rates are too high in an area.
4. State commissions should retain a role, as well as substantial discretion in developing retail rates for carriers of last resort.
5. A proposal preserving a significant State role that fits within the confines of existing law is preferable.

Again, the Plan ignores the NARUC principles since it clearly preempts state authority on intrastate intercarrier compensation issues. The Plan anticipates either federal oversight, or no regulatory oversight, with respect to intercarrier compensation, the SLC, the Restructure Mechanism ("RM") and any state universal service fund designed to effectuate access rate reform.

F. Universal Service and Consumer Protection

1. A new intercarrier compensation system should ensure continuity of existing services and prevent rate shock to end-users. Penetration rates for basic service should not be jeopardized.
2. The Plan should recognize that areas served by some rural LECs are significantly more difficult to serve and have much higher costs.
3. Rural customers should continue to have rates comparable to urban customers. Basic local rates should not be increased above just, reasonable and affordable levels.
4. The Plan should minimize the cost impact on both the federal and state universal service programs.

The Plan fails to meet the NARUC principles for Universal Service and Consumer Protection. It is difficult to quantify "rate shock" but the Plan shifts all revenue losses from an intercarrier compensation regime to the end-user. End-user rates increase through SLC, RM and USF surcharges. The Plan does not demonstrate that rural rates will be comparable to urban rates.

Further, the MoPSC doubts that such an objective is possible since the Plan proposes different rate structures for different Tracks and allows the SLC and the RM to be deaveraged as the carrier deems necessary. Since the plan adjusts or adds federal high cost support mechanisms, shifts state USF funds, and creates a "faux-USF" through the Restructure Mechanism, the plan clearly violates any goal designed to minimize the impact on state and federal universal service funds.

G. Achievability and Durability

> 1. The Plan should not only recognize existing circumstances but should anticipate changes. The Plan should provide solutions that are appropriately resilient to change.

Although the Plan does not specifically anticipate change, it does require the Commission to revisit the provisions of the Plan and determine whether it is achieving the Commission's goals for intercarrier compensation. Several portions of the Plan continue to be developed, and will presumably be submitted for formal comment before being accepted as automatically amending the Plan as filed on July 24, 2006. The Plan contains footnotes that cause the MoPSC concern. For instance, footnote 10 discusses the Plan supporters' commitment to work with state commissioners in resolving outstanding issues. The footnote states that any resolution will be filed as an amendment to the Plan and the *"relevant State Commissions shall support the entire Plan as amended*." The MoPSC takes exception to the suggestion that an industry proposal can preempt a state commission's ability to offer concerns and objection to the Plan. Further, members of the MoPSC and its

Staff have participated in the NARUC Task Force processes, but such participation does not reflect the opinion or decision of the participants or the MoPSC as a body and is in no way pre-determinative of their views on such a complex and comprehensive Plan.

H. Prerequisites for Plan Implementation

1. The estimated cost impact on a carrier-by-carrier basis, by State, must be computed before a decision is made on the Plan.
2. The FCC should identify, quantify and evaluate the total of all federal high cost universal service fund payments received by each company today and should revise the support mechanisms to ensure that telecommunications services remain accessible and affordable.
3. The FCC should be required to regularly revisit its cost allocation rules for regulated/nonregulated services. Rates that should not be recovered through regulated rates ought to be excluded from the Plan.
4. Before the Plan is implemented, the effect of the plan on local exchange rates should be computed.
5. The Plan should be referred to the Joint Board and Joint Conferences.

The Plan fails to meet the Prerequisite objectives. The costs and benefits of the Plan have only been reviewed on an averaged basis and are not all inclusive as will be demonstrated in these comments. There is no evidence that specific state impacts have been examined. Further, to the knowledge of the MoPSC, the Commission has not evaluated the USF. The proponents of the Plan attempt to quantify the affect on end-users, but as explained further in these comments, those efforts are flawed.

III. LEGAL OVERVIEW

<u>The Plan Unlawfully Preempts State Jurisdiction</u>

The Commission does not have authority to adopt the Plan because the Plan imposes federal rules in areas that are subject to the direct authority of the states under the Act, and that are reserved to the states under section 152(b). While Plan supporters argue that the Commission has adequate power to mandate all intercarrier compensation terms under sections 201 and 251(b)(5), they are completely wrong. Quite simply, section 201 only gives the Commission authority *over matters to which the Act applies,* and the Act reserves jurisdiction to the states over intrastate access charges. The Commission also cannot bootstrap the impossibility exception set forth in *Louisiana Public Service Comm'n v. FCC*[4] or disguise preemption as "voluntary" participation to justify nullifying state authority in these areas. Moreover, the Commission cannot void the dual jurisdictional scheme Congress enacted in the local competition provisions of the Act by forbearing from applying provisions directing *states* to exercise authority. All in all, the Commission does not have authority to adopt the Plan's terms that set intrastate access charges, that void state authority over interconnection terms and the rural exemption, or that result in over-broad preemption of other laws, rules and orders lawfully adopted by states.

A. The Commission Does not have Direct Authority under the Act to Set Intrastate Access Rates

[4] 476 U.S. 355 (1986).

As their primary legal justification for the Plan, Plan supporters boldly claim that the Commission has direct authority under sections 201 and 251(b)(5) to impose mandatory requirements binding on the states to reach all classes of intercarrier compensation (except arguably for originating intrastate access).[5] To make this argument, plan supporters have to stretch Reciprocal Compensation Section 251(b)(5)[6] to cover compensation for transporting interexchange traffic. While they admit that Congress carved out access traffic from section 251(b)(5)'s scope in section 251(g), supporters claim that the Commission can sweep all intrastate access traffic under section 251(b)(5) now by adopting the Plan's intercarrier compensation scheme as the new regime.[7]

Supporters are wrong that the Commission can set intrastate access charge prices by straining section 251(b)(5) to cover intrastate traffic that was never within its scope. First, the Commission must step back to look at Congress' overall scheme for intercarrier compensation. In section 251, Congress expressly distinguished exchange access services covered under section 251(g) from reciprocal compensation transport and termination

[5] *See* Letter to Kevin Martin, Chairman, FCC, from Tony Clark, Commissioner, North Dakota Public Service Commission, Chair, Committee on Telecommunications, Ray Baum, Commissioner, Oregon Public Utility Commission, Chair, Task Force on Intercarrier Compensation, Larry Landis, Commissioner, Indiana Regulatory Commission, Vice-Chair, Task Force on Intercarrier Compensation, CC Docket No. 01-92 (Jul. 24, 2006), app. A (The Missoula Plan), attach. A at 1 (Attachment A). General references to the Missoula Plan will be cited as "The Missoula Plan." References to specific sections within the Plan will be referred to by the name of that section.

[6] "Reciprocal Compensation" is the title of the section.

[7] See Attachment A at 1 & n.1.

arrangements covered under section 251(b)(5), and gave separate and independent treatment to these two compensation arrangements. Subsection (b)(5) addresses the LECs' duty to transport and terminate the traffic of other carriers competing in the same local exchange area. It makes no reference to, and does not apply to, interstate or intrastate exchange access service. The title defines the scope of the section. LECs have never had "reciprocal compensation" arrangements with interexchange carriers.

The legislative history and Commission precedent confirm that the scope of section 251(b)(5) does not include access charges. The legislative history clarifies that section 251 procedures and obligations do *not* apply to interconnection agreements between LECs and carriers providing interexchange service, and that nothing in the section was intended to affect preexisting access charge rules.[8] Consistent with Congress' intent, the Commission has interpreted section 251(b)(5) *not* to include access charges from its earliest analysis of that section. As it stated in its *Local Competition First Report and Order*:

> Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b) and 252(d)(2), while

[8] *See* S. RPT. NO. 104-23, 104th Cong., 1st Sess., at 19 (1995). The legislative history of the Senate bill states, regarding section 251, that "[t]he obligations and procedures prescribed in this section do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under section 201 of the 1934 Act for the purpose of providing interexchange service, and nothing in this section is intended to affect the FCC's access charge rules." *Id.* The Joint Explanatory Statement accompanying the Conference Report to the Telecommunications Act of 1996 notes that section 251 "adopts a new model for interconnection that incorporates provisions from both the Senate bill and the House amendment." *See* H.R. REP. NO. 104-458, 104th Cong., 2d Sess., at 119 (1996).

> access charges for interstate long distance traffic are governed by sections 201 and 202 of the Act.[9]

Section 251(b)(5) clearly does not apply to compensation for interexchange carrier traffic, based on a plain reading of the statute, legislative history, and the Commission's own interpretations of that section. The Plan supporters' claim that long distance services are included within section 251(b)(5) cannot stand in the face of these many conclusive statements to the contrary.[10]

Even though Reciprocal Compensation Section 251(b)(5) does not cover access charges, Plan supporters now improperly ask the Commission to use section 251(g) to sweep *all* access charges, including intrastate charges, under a new Reciprocal Compensation Section 251(b)(5) regime. Even if the Commission could use this section to address interstate access charges, it certainly could not stretch so far as to create a whole new power to set intrastate access prices. As the Supreme Court has directed, the Commission's authority to set rules arises *only to those matters to which the 1996 Act applies*.[11] Section 251(g) does not give the Commission *any* new independent authority to preempt states' jurisdiction over intrastate access

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[9] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16012-13 ¶¶ 1033-34 (1996).

[10] Plan supporters incorrectly argue that long distance services are covered within "telecommunications" in section 251(b)(5) based on *U.S. Telecom. Ass'n v. FCC*, 359 F.3d 554, 591-92 (D.C. Cir. 2004). In that case, the court held that long distance services were "telecommunications services" for purposes of section 251(d)(2). *See id.* Subsection (d)(2), however, describes the standards for the FCC's UNE rules and explicitly refers back to section 251(c)(3). In contrast, the scope of section 251(b)(5) is limited to "Reciprocal Compensation," and clear legislative intent and Commission rulings preclude including long distance traffic within its scope.

[11] *See AT&T Corp. v. Iowa Utils. Bd.*, 505 U.S. 366, 380-81 (1999).

charges. In fact, Congress included section 251(g) to ensure Bell Operating Companies ("BOCs") and GTE abided by interstate access obligations (*e.g.* equal access) and procedures contained in the AT&T Consent Decree, court orders, and other preexisting federal regulations and orders. Congress did not include section 251(g) to give the Commission new jurisdiction over intrastate access rates when states had set separate state-specific access charges for many years under their section 152(b) reserved powers.[12]

Moreover, the Commission has resolved this issue itself. It has already concluded that jurisdiction over intrastate access remained with the states under section 251(g).[13] In the *ISP Remand Order*, the Commission held that the section 251(g) "grandfather" clause left jurisdiction over intrastate access charges under state control. Specifically, it held that the listed access services in section 251(g) "remain subject to Commission jurisdiction under section 201 (*or to the extent they are intrastate services, they remain subject to the jurisdiction of state commissions*).[14] The Commission cannot now reverse that holding without explaining why its interpretation has changed,

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[12] Section 251(g) gave the Commission power to continue to enforce certain equal access and exchange access requirements imposed on the BOCs and GTE that might otherwise have expired with the passage of the 1996 Act. Specifically, the subsection was intended to clarify that the RBOCs and GTE should not be permitted to use termination of the AT&T Consent Decree as an excuse to stop providing equal access and nondiscriminatory exchange access to information service providers and interexchange carriers. *See* H.R. CONF. REP. NO. 104-458, at 122-23.

[13] *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd. 9151 (*ISP Remand Order*), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003).

[14] *See id.* at 9169 (emphasis added).

how its new interpretation squares with Congress' explanation for that section, and how preemption is justified in light of states' reserved power under section 152(b).

Because section 251(g) has no effect on the federal/state division of authority over access charges, states retain exclusive control over intrastate access prices pursuant to section 152(b).[15] The Supreme Court has given the Commission clear direction that the Commission cannot preempt states in areas to which the Act does not apply.[16] As it said, "[i]nsofar as Congress has remained silent…section 152(b) continues to function."[17] Therefore, the Commission does not have the authority to adopt plan rules setting either *terminating or originating* intrastate access charges.

[15] In addition, section 601(c) of the Telecommunications Act of 1996 states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless *expressly* so provided in such Act or amendments. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, Title VI, §601(c), Feb. 8, 1996, 110 Stat. 143 (codified at 47 U.S.C. § 152 note) (emphasis added).

[16] *AT&T v. Iowa Utils. Bd.*, *supra* note 11.

[17] *Id.* at 381.

B. The Commission Cannot Preempt State Jurisdiction under the Supremacy Clause

Lacking statutory support, the Plan supporters turn to the Supremacy Clause as an alternate basis of preemption. They claim that the "impossibility" exception in *Louisiana Public Service Commission v. FCC* authorizes the Commission to regulate matters traditionally left to the states where such regulation is necessary to protect a valid federal regulatory objective.[18] Preemption is justified, they claim, because the Commission cannot achieve the federal goal of effective intercarrier compensation reform if states substantially deviate from the national plan.[19] First, the impossibility exception does not justify Commission preemption of state access charges. The Supreme Court held that the Commission could preempt states where "it was not possible to separate the interstate and the intrastate components of asserted FCC regulation."[20] As an example, the court noted that the Commission could preempt state regulation prohibiting customers from owning their own phones, where federal law permitted customers to provide their own telephone for service.[21] The two regulations were in conflict - federal law could not be followed without violating state law. Here, however, carriers can distinguish intrastate and interstate access calls by

[18] *See* Attachment A at 5.

[19] *Id.* at 5.

[20] *See Louisiana Pub Serv. Comm'n. v. FCC*, 476 U.S. 355, 376 n. 4 (1986).

[21] *Id.*(citing *North Carolina Utils. Comm'n. v. FCC*, 537 F. 2d 787 (4th Cir. 1976), *cert. denied*, 429, U.S. 1027 (1976), *North Carolina Utils. Comm'n. v. FCC*, 522 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977).

identifying their end points. Calls originating and terminating within a state are intrastate, and calls with one "leg" outside the state are interstate calls. It is not impossible or even difficult to identify the jurisdictional nature of most access traffic.

When their explanation is read carefully, supporters only really claim difficulty in distinguishing intrastate and interstate wireless and VOIP calls.[22] Yet, classifying wireless and VOIP calls by jurisdiction is not impossible. For example, the Commission could develop proxies, such as using a billing address, to identify the originating point of the call. The Plan finds solutions to identifying transmission points of phantom traffic carried over the Internet.[23] The Plan also provides a means for determining which jurisdiction's rates apply to wireline-to-CMRS calls.[24] Alternatively, carriers could perform traffic studies or the Commission could employ safe harbor principles like those applied to calculate USF payments. There is no evidence that separately identifying intrastate access calls is so impractical that preemption of all state jurisdiction over intercarrier compensation is justified.

Particularly when the exception is read in context, it provides no basis for preempting all state jurisdiction over access charges. Under *Louisiana*, the Commission may preempt states where: (1) the decision serves valid

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[22] *See* Attachment A at 6.

[23] *See id.* at 56.

[24] *See* The Missoula Plan, Executive Summary at 8 (hereinafter "Executive Summary").

goals under the Commission's jurisdiction; (2) preemption is necessary to avoid frustrating federal goals; *and* (3) preemption is narrowly tailored to take from states only those aspects of regulation that cannot be separated into intrastate and interstate components.[25] Here, preemption is not justified because the plan does not achieve a valid federal goal, preemption is not necessary to avoid frustrating federal goals, and the Plan preempts state power far beyond parts of regulation that allegedly cannot be separated.

Clearly, the Plan does not even achieve the federal objective it sets out. The Plan does not result in unified rates for all carriers and traffic. Gaming and arbitrage opportunities will still exist in the compensation system. In fact, the Plan creates new gaming opportunities, as carriers can maximize the revenue they earn through shifting cost recovery to multiple other mechanisms – the Restructure Mechanism, increased and deaveraged SLCs, and adjusted USF subsidies. The Plan guarantees carriers full revenue recovery without audits or true-ups. To top it off, no government agency will be able to limit carriers' excessive charges because the Plan preempts states authority over all intercarrier compensation. The Commission has no justification for preempting state authority where the compensation plan not

[25] *See, e.g., California v. FCC*, 75 F.3d 1350 (9th Cir. 1996), *cert. denied*, 517 U.S. 1216 (1996) (upholding Commission order limiting state restrictions on per-line, as opposed to per-call, blocking of Caller I.D. as, among other things, fitting within the "impossibility" exception, where it was not possible to separate components of state and federal regulation); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (rejecting Commission order releasing BOCs from requirement that they must offer enhanced services through a separate subsidiary and preempting states from regulating enhanced services because, among other things, state regulation of enhanced services would not make federal regulation impossible).

only fails to achieve the goal it sets out but also thwarts a number of other important federal policy objectives.[26]

The Plan's preemption provisions are not necessary to avoid frustrating unified intercarrier compensation goals. Because the Plan does not create a unified intercarrier compensation scheme, differences already exist in rates charged under the Plan. Preempting state access rates, in cases where they may not be set at exactly the same level as interstate rates, is not necessary because the Plan already permits inconsistent rates. Preemption is also not necessary to avoid arbitrage/gaming since the Plan does not eliminate these gaming opportunities in the first place, and creates even more opportunities.

Also, preempting all state jurisdiction over access charges to address a limited classification issue is not a narrow, targeted remedy. The Plan preempts state jurisdiction over intercarrier compensation for all traffic, not just for wireless and VOIP traffic. Beyond that, the plan unnecessarily preempts a number of other areas of state authority that have nothing to do with alleged separation problems of wireless and VOIP traffic. For all these reasons, the Supremacy Clause does not provide an alternate basis for preempting state authority.

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[26] Not only does the plan fail to achieve an effective intercarrier compensation scheme, but it thwarts other important Commission goals in the process. Among its many flaws, the plan makes the USF *less* sustainable by increasing it by $2.2 billion. It makes end user rates *less* affordable and *less* reasonable by shifting all revenue losses from the. intercarrier compensation regime onto end users. End users bear higher SLCs, a new RM surcharge, higher USF charges as well as other hidden charges (e.g. new LNP surcharges) without any guarantees that their toll rates will be reduced to account for access charge reductions.

C. The Plan's "Incentives" for State Participation Unlawfully Infringe State Jurisdiction Because they Cross the Line from Encouragement to Coercion

Supporters claim the Plan obviates any need for federal preemption because state participation is voluntary where states could properly exercise jurisdiction.[27] The Plan permits states to "opt in" to provisions setting intrastate originating access rates for Tracks 1 and 2 and to Track 3 rate levels for originating and terminating intrastate access traffic.[28] Plan supporters claim that offering states incentives to participate is consistent with the principle of dual jurisdiction.[29] However, the Plan's penalties for not participating are so great that they cross the line from encouragement to coercion. They unlawfully infringe on states' authority. State participation is compelled, not encouraged.

Courts have repeatedly held that the federal government cannot "encourage' states to participate in federal programs by offering measures that are so onerous they effectively compel participation.[30] That certainly is

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[27] *See* The Missoula Plan, Policy and Legal Overview at 7-8 (hereinafter "Policy & Legal Overview"). The Plan fails to make state participation in intrastate terminating access charges for Track 1 voluntary. Thus, the Plan's voluntary terms do not even cover all areas where states' jurisdiction is reserved under section 152(b).

[28] *See id.* at 4.

[29] *Id.* at 8.

[30] *See e.g. New York v. U. S*, 505 U.S. 144 (1992) (striking down a provision of federal radioactive waste law, which required states either to take title to the waste within their borders or regulate storage and disposal of the waste according to Congressional direction, finding that the "incentive" went beyond Congress's powers and infringed state sovereignty reserved by the 10th Amendment.); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S.Ct. 2291 (1999) (holding that Congress cannot condition a state's sale of tuition prepayment plan on relinquishment of its immunity to Lanham Act suits for false advertising, finding the condition amounted to forced, not voluntary, waiver.); *Printz v. U.S.*, 521 U.S. 898 (1997) (striking down provisions of the

the case here. If a state chooses not to participate in the Plan, it faces untenable consequences. A state's customers will still have to pay all the costs of funding the Plan – increased SLCs, Restructure Mechanism Surcharges, and higher USF surcharges – even if the state does not participate. As a result, the state's end users will subsidize the access reform of *all* participating carriers nationwide through these increased charges. Penalties to a state's customers are so onerous that they go far beyond incentive to coercion. Customers will have to pay multiple higher charges and surcharges on their bills, without receiving one single benefit from the program.

Clearly, the Plan's "incentives" are not consistent with the principle of dual jurisdiction. They go far beyond the Commission's legitimate power to encourage cooperation, and unlawfully infringe core state authority reserved under section 152(b). A state will have no choice but to participate to avoid unfairly and unnecessarily increasing end users' bills in the state.

D. The Plan Unlawfully Preempts Direct Authority Congress Gave States to Implement Local Competition Provisions of Act

The Plan also unlawfully preempts direct authority that Congress gave the states in sections 251 and 252 to implement the Act's local competition provisions, nullifying the dual jurisdictional system that Congress established. The Plan preempts states' power under section 252(d) to set interconnection rates and other interconnection terms, such as transport

Brady Act, which forced states to take action by requiring state official to conduct background checks, as violating the 10th Amendment).

points of interconnection and rates; and also preempts states' power under section 251(f) to determine whether to lift rural ILECs' exemption from section 251(c) interconnection requirements, and to suspend and/or modify rural and certain mid-size carriers' obligations under sections 251(b) and (c). The Commission cannot create its own authority by forbearing from applying these sections. As such, the Plan unlawfully alters the specific federal and state roles Congress prescribed for implementing local competition.

As Plan supporters admit, Congress gave states the power under sections 252(c)(2) and 252(d)(2) to prescribe actual rates for traffic subject to section 252(b)(5).[31] The Supreme Court has limited the Commission's role to prescribing rate methodology for compensation, and the Commission is *not* permitted to set actual rates for traffic subject to section 252(b)(5).[32] The Plan's provisions unlawfully require the Commission to do just that. The Plan sets specific rate levels for section 252(b)(5) traffic. Also, under the Plan, a carrier can demand that other carriers physically interconnect at "Edges" it specifies, and a carrier connecting to the network must pay transport to deliver its originating traffic to the terminating carrier's Edge.[33] This provision is inconsistent with state authority to arbitrate as recognized in other parts of the Plan, and infringes upon state commissions' authority under section 252(b) and (d)(2) to determine specific points of interconnection

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[31] *See* Attachment A, at 7.

[32] *See AT&T v. Iowa Utils. Bd.*, *supra* note 11.

[33] *See* Executive Summary at 11.

between carriers and enforce, for example, policy that each carrier should be responsible for transporting traffic on its side of the Point of Interconnection. This is current Missouri policy.

The Commission cannot simply forbear from applying sections 252(c)(2) and 252(d)(2) to give itself the authority to set rate levels.[34] While section 160 gives the Commission forbearance authority, it can only forbear from applying powers that Congress gave it to execute in the Act. To the extent the Act reserves power to the states under section 152(b), or the Act gives states direct power, the Commission has no authority at all.[35] Under the plan supporters' logic, the Commission could forbear from "applying" section 152(b), and thereby void state jurisdiction over all regulatory areas reserved to state control. Certainly, Congress did not intend the Commission to nullify the dual jurisdictional scheme that it expressly established in the original 1934 Act and intentionally carried through in the 1996 amendments.

Additionally, the Plan appears to preempt state authority under section 251(f) to determine whether rural ILECs and certain mid-size ILECs must follow section 251(c) interconnection obligations. The Plan appears to require all carriers to negotiate interconnection agreements.[36] If the Plan

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[34] *See* Attachment A at 7.

[35] *See AT&T v. Iowa Utils. Bd., supra* note 11.

[36] *See* Attachment A at 7; Executive Summary at 9 ("Carriers may request a formal interconnection agreement for any other carrier for the exchange of non-access traffic."); Policy & Legal Overview at 7 ("[T]he Commission has full authority under section 201 and the principles of [*Iowa Utils. Bd.*] to implement section 252 to require all carriers to negotiate interconnection agreements." (citation omitted).

requires rural ILECs to enter into interconnection agreements covering any section 251(c) obligations, it automatically terminates their rural exemption without a state commission determination under section 251(f)(1)(B). Similarly, the Plan improperly nullifies state authority to determine whether to modify or suspend any section 251(c) or (b) obligations for certain rural or mid-size carriers under section 251(f)(2).

In all these cases, the Plan requires the Commission to void state commission authority which Congress expressly directed be exercised on the state level. The Commission does not have the power to take such action, and cannot use forbearance to create new power that Congress did not mandate.

E. The Plan Unlawfully Preempts Other State Laws, Rules and Orders

The Plan is so over broad that it establishes a number of other rules and rates applicable on the state level that conflict with preexisting state laws, rules and orders. There is no evidence that the Commission needs to preempt state laws which do not conflict with valid federal policies. Certainly, the Plan's sweeping approach far exceeds that necessary to remove state aspects of regulation that cannot be separated into interstate and intrastate components.

In these comments, MoPSC has identified a number of state court decisions, rules and orders that the Plan overturns, without any lawful justification. For example, the Plan appears to conflict with the Missouri Metropolitan Calling Area plan, a plan in effect for over 15 years that has successfully resolved a number of end user complaints concerning EAS traffic. The Plan also overturns a federal court decision that MoPSC has properly followed in a number of recent arbitration cases that intraMTA wireline-to-CMRS traffic is subject to reciprocal compensation, not switched access charges.

In each of these cases, the state has resolved issues effectively, consistent with local facts and circumstances and state policy. There is no reason for the Commission to overturn all state and court decisions applying appropriate local solutions in the name of adopting a unified compensation scheme.

IV. PUBLIC POLICY GOALS

According to the Plan's Executive Summary, parties compromised on issues in order to develop the Plan and to "advance important public policy goals". The Plan, in fact, does advance public policy on several issues. Unfortunately, in the MoPSC's opinion, the Plan establishes policy that is consistent with the proponents' adversarial positions on several issues that have been previously determined to the contrary by the Commission, state commissions, and the courts. The MoPSC is concerned that these major policy issues are being determined in favor of the views of a limited number of carriers through an industry proposal with limited support, under the façade of a "compromise" that is clearly not supported by all stakeholders. For instance, the Plan determines intraMTA wireline-to-CMRS traffic that traverses the network of an interexchange carrier is subject to access charges.

In *Atlas*, the court determined that similar traffic should be subject to reciprocal compensation, not switched access charges.[37] The MoPSC relied on this decision in recent arbitration cases.[38] Similarly, the Plan determines such issues as virtual NXX, compensation for VoIP traffic and compensation for wireless traffic. The Plan, in effect, determines switched access rates apply in all situations where a call does not originate and terminate within the same rate center. Once again, this determination is contrary to recent decisions at the court and state levels.[39] Regardless of the positions taken by the members of the MoPSC, decisions related to intrastate issues should be made at the state level, not the federal level.

V. THE MISSOULA PLAN

<u>Plan Implementation</u>

A. Mandatory vs Voluntary Aspects of the Plan

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[37] *Atlas Telephone Co. v Oklahoma Corp. Com'n.* 400 F.3d 1256, 1264 (10th Cir. 2005).

[38] Arbitration Order. *In the Matter of the Petition of Alma Telephone Company for Arbitration of Unresolved Issues Pertaining to a Section 251(b)(5) Agreement with T-Mobile USA, Inc.* Case No. IO-2005-0468, available at http://psc.mo.gov/orders/2005/10065468.htm (October 6, 2005). (Commissioners Gaw and Clayton dissented).

Arbitration Order. *In the Matter of the Petition for Arbitration of Unresolved Issues in a Section 251(b)(5) Agreement with T-Mobile USA, Inc.* Case No. TO-2006-0147, 2006 Mo. PSC Lexis 342 (March 23, 2006) (Commissioners Gaw and Clayton dissented).

[39] Arbitrator's Report. Arbitration Order. *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A").* Case No. TO-2005-0336, 2005 Mo. PSC Lexis 963 (effective July 11, 2005).

Final Commission Decision. *Petition of Socket Telecom, LLC for Compulsory Arbitration of Interconnection Agreements with CenturyTel of Missouri, LLC and Spectra Communications, LLC, pursuant to Section 251(b)(1) of the Telecommunications Act of 1996.* Case No. TO-2006-0299, available at http://psc.mo.gov/orders/2006/062706299.htm (effective June 30, 2006) (Commissioner Murray concurred).

Global NAPs, Inc. v. Verizon New Eng., Inc., 444 F.3d 59 (1st Cir. 2006).

The Plan's supporters, "hope and expect that States will implement *all* of the Plan's provisions" even though the Plan allows States the discretion to decide whether to participate in certain aspects of the Plan.

A.1 Voluntary Aspects of the Plan

For Track 1 and Track 2 Carriers, States can elect whether to implement the provisions related to reforming intrastate originating access rates; however, the subscriber line charge caps will increase for end users of Tracks 1 and 2 even if States elect not to participate in the intrastate originating access reform proposal. For Track 3 Carriers, States can elect whether to implement the Plan's rate levels for originating and terminating intrastate access traffic. As an additional "incentive" for States to participate in the Plan, carriers in participating States will be eligible for support from the Restructure Mechanism fund. In other words, in States that elect not to participate in the voluntary portions of the Plan (i.e., intrastate access reform), end users will subsidize the access reform of all participating carriers nationwide through increased SLC and RM surcharges. Further, carriers can petition the Commission in Step 2 (or after one year) to preempt State authority over intrastate originating access rates in order to fully implement the Plan, so any State decision to not participate in the Plan is probably short-lived.

A.2 State determination

While the Plan does not explicitly define "State", the MoPSC assumes "State" is synonymous with the state utility commission. The Plan does not address the procedure a state commission will use to make the determination to participate in the voluntary portions of the Plan and does not provide a definitive timeframe for making such determination (other than implying the determination will be made in Step 1, or on the effective date of the Plan[40]). The MoPSC suggests any voluntary determination to participate in the Plan can only be accomplished through a state proceeding allowing the state commission to obtain evidence on the benefits and harms of participating in the intrastate portions of the Plan. It is not realistic to expect state commissions to elect to participate in the voluntary portions of the Plan immediately upon the effective date of the Plan. The MoPSC suggests the Commission establish a more realistic deadline for State consideration and determination, which includes time for each state to complete an evidence gathering process. This evidence should also be reviewed and updated by the Commission in response to any petitions to preempt state authority, which can be submitted at the beginning of year two (or Step 2).

[40] Missoula Plan Executive Summary page 2.

Intercarrier Compensation Framework

A. Tracks

For purposes of the Plan, all ILEC study areas are assigned to a "Track" which determines the carrier's rights and obligations. In general terms, the "size" of the ILEC determines the track. Track 1 (Regional Bell Operating Companies and other large ILECs) consists of approximately 92 ILEC study areas and 146.2 million ILEC loops; Track 2 (mid-size rural carriers) consists of approximately 158 ILEC study areas and 12.5 million ILEC loops; Track 3 (smaller rural, rate-of-return carriers) consists of approximately 1,185 ILEC study areas and 7.3 million ILEC loops. All non-ILECs (wireless, CLECs, cable providers, etc.) fall into Track 1.

While it may be appropriate to treat carriers that are not similarly situated in a different manner, there is no justification in the Plan for basing intercarrier compensation reform on the size of the carrier. The majority of the MoPSC suggests it may be more appropriate to categorize companies based on a "rural" and "non-rural" study area distinction instead of the overall size of the carrier in a particular study area. This concept was explored when the Federal-State Joint Board on Universal Service ("Joint Board") sought comment on proposals developed by several Joint Board members and the Commission staff to modify the Commission's rules relating to high-cost universal service support.[41] In response to the Public Notice, the

[41] Public Notice. CC 96-45. August 17, 2005.

MoPSC informed the Commission that CenturyTel of Missouri and Spectra Communications Group, LLC, d/b/a CenturyTel had over 400,000 Missouri access lines between the two companies and Sprint (now Embarq) had over 200,000 Missouri access lines. Both companies are, for the most part, considered rural for universal service fund support. In contrast, SBC (now AT&T) had over 2 million access lines and is considered a non-rural company. Although AT&T serves the larger metropolitan areas of the state, many AT&T exchanges and access lines are similarly situated to rural exchanges and access lines of CenturyTel and Embarq. (While Embarq is a rural carrier for USF purposes, it should be noted that for the Plan, certain areas of Embarq service territory would fall in Track 1 or 2; however, the discussion is still relevant.) The NARUC principles contemplate a proposal that will acknowledge the competitive/non-competitive nature of the various telecommunications markets. This concept may also be a more appropriate means of dissecting carriers into "Tracks".

Another reasonable means for determining the appropriate "Track" for a carrier would be to consider the need of the carrier.

> "The Act does *not* guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of *customers,* not *providers.* So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act

> and is not further required to ensure sufficient funding of every local telephone provider as well."[42]

The MoPSC questions whether carriers should simply be guaranteed revenue neutrality. Instead, compensation reform should be based on need and ability to meet the universal service goals of Section 254 of the Act: namely, that quality service should be available at just, reasonable and affordable rates; that access to advanced telecommunications and information services should be provided in all regions of the Nation; that customers in rural, insular and high cost areas should have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas; that all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service; and that there should be specific, predictable and sufficient mechanisms to preserve and advance universal service.

Under this concept, carriers that require a guaranteed revenue stream to expand networks or make improvements that will benefit the end-user would be ensured a return from increased SLC caps, the RM and the modified USF. Such a concept would require company-specific proceedings and would ensure revenue recoveries provided through federal support or subsidies are only targeted to areas in need of advancing the goals of the Act.

[42] *Alenco Communications, Inc. v. F.C.C.,* 201 F.3d 608, 620 (5th Cir. 2000).

In response to the Commission's request for comment on the oversight and management of the USF, the MoPSC provided the following comments, which represent the importance of determining need before incessantly increasing end-user surcharges to provide compensation recovery through guaranteed support mechanisms:

> On April 8, 2005, Alma Communications Company, d/b/a Alma Telephone Company ("Alma") filed an application seeking authority to borrow $5,579,000 from the Rural Utility Service Administration ("RUS") in order to upgrade its network and purchase a new switch. Alma is a small, rural incumbent local exchange carrier with approximately 350 customers. Alma last updated [its] subscriber lines and plant in 1972 and purchased its [switch] in 1992. Alma intends to install a next generation "soft switch" with IP technology and plans to replace existing loops and plant with fiber. With the exception of a few technical specifications, Alma will be 100 percent fiber to the home upon completion of the project. Such activities are consistent with the goals of universal service since any USF monies would be used for the "provision" and "upgrade" of facilities.
>
> In conjunction with the Commission's review of the management, administration and oversight of the USF, the MoPSC would like to share the following responses Alma provided to MoPSC questions on the details of the financing.
>
> > MoPSC Question:
> >
> > **"How is the company going to repay this loan if the loan amounts to approximately $16,000 per customer? Will Alma get more USF to help pay for this?"**
> >
> > Alma's Response:
> >
> > "Alma understands the $16,000 figure represents per customer recovery over 5 years. The loan period exceeds 20 years, so this figure appears to be somewhat overstated. The increased revenue needed to repay this loan will primarily come from increases in Federal USF support. Alma will convert from a National Exchange Carrier Association (NECA) average schedule to a cost company. This conversion, and the new switch and

fiber investment are **calculated to increase Alma's Federal USF Support payment by more than $600,000 per year by 2007**. This increased USF support is a part of the financial analysis upon which the RUS loan application was submitted and approved, upon which this loan application was submitted, and upon which Staff's recommendation was based." (emphasis added)

In response to the same question, the Staff of the MoPSC stated:

"Alma intends to repay the loan solely through increased Federal Universal Service Fund (USF) support payments. The Company does not anticipate increasing rates for any existing services. Staff notes that the actual loan term is 26 years. During the first two years of the loan term, Alma pays interest only and makes no principal payments."

RUS and the MoPSC approved Alma's financing proposal.

Commissioner Connie Murray, in a dissenting opinion, commented,

"I must dissent from the Commission's Order because I am concerned that the use of the USF subsidy contemplated in this case contributes to the magnitude of the problems currently plaguing the USF…"

Later in the dissenting opinion, Commissioner Murray states,

"And to make this loan payment, Alma, rather than relying even in part on increased rates for customers, is solely relying on disbursements from the USF to repay the loan…The disbursements from the USF will be more than adequate to cover the annual debt service payments, leaving Alma with a tidy profit of $300,000 to $350,000 annually,

> over and above other profits the company already realizes."[43]

B. Phase Down and Unification of Intercarrier Charges for Each Track

A carrier's Track determines the nature and pace of intercarrier compensation reform. Under Tracks 1 and 2, the rates for terminating traffic will converge into a single rate schedule with a single rate structure for each Track over three steps, or two years. For Track 1 and 2, originating access will be reduced or eliminated, at the carrier's option, over four steps, or three years. Track 3 intrastate rates will be lowered to interstate rates over four steps, or three years. Revenue neutrality is ensured through an increased subscriber line charge, increases to the federal universal service fund surcharge and the Restructure Mechanism. According to Exhibit 1 of the Plan, "Even taking a purely static view of the impact of the Missoula Plan on end-user's total telephone bills – *i.e.*, assuming that implementation of intercarrier compensation reform does not spur increased competitive pressure on rates – most end-users will not see any significant increases." While the specifics of this claim will be discussed in more detail later, the MoPSC would like to take this opportunity to reiterate concerns raised in comments filed in 2005 on the various intercarrier compensation proposals filed in this docket:

[43] Comments of the Public Service Commission of the State of Missouri. *In the Matter of Developing a Unified Intercarrier Compensation Regime*. CC Docket No. 01-92. Filed 5/23/05.

> The MoPSC supports a proposal that promotes reasonable end-user rates and avoids rate shock. For this reason, it may be appropriate to establish a national average for basic local rates, with a floor and ceiling to minimize any impact to the end-user. It should also be noted, however, that any national average benchmark rate should include all end-user charges related to basic local service (whether an increase in the SLC, the USF surcharge or some new mechanism). Ultimately, it is the end-user that bears the burden of paying for such subsidies.

B.1 The Missoula Plan Will Not Result in Lower Telephone Bills as Plan Supporters Claim

The Executive Summary of the Plan states, "The main winners are consumers". In support of this statement, the Plan's proponents submitted Exhibit 1 - charts purportedly demonstrating that, "even taking a purely static view of the impact of the Missoula Plan on end-user's total telephone bills – *i.e.*, assuming that implementation of intercarrier compensation reform does not spur increased competitive pressure on rates—most end-users will not see any significant increase." The MoPSC finds the assumptions and associated results contained within the charts fundamentally flawed.

Exhibit 1 implies competitive pressures may force carriers to lower rates. There is no demonstration that competitive pressures will lower rates. Further, since carriers are able to deaverage SLCs and RMs, it is likely that end-users in competitive markets will "win" at the expense of end-users in non-competitive markets. Finally, economic theory suggests competitive pressure moves rates toward costs and what the market will bear, regardless of whether the resulting rate is an increase or decrease. As an example, AT&T Missouri was granted competitive classification in many of its exchanges in October 2005. In March and July 2006, AT&T Missouri increased its rates in competitive exchanges between approximately 4.8 percent and 19 percent. The MoPSC has an open docket associated with these rates increases; therefore, it expresses no opinion on the filing, but uses this example to illustrate that there is no guarantee that competitive pressures will result in lower rates.

The charts also assume a 100 percent flow-through of the decrease in access charges to retail per minute long-distance rates. Nothing in the Plan requires interexchange carriers to flow through a decrease in access charges. Further, in an environment of declining toll revenues and increased bundled offerings, it is not realistic to assume access rate reductions will be passed on to the end-user in the form of lower rates. Commission data demonstrates that total intrastate and interstate billed access minutes fell from 792 billion in 2000 to 602 billion in 2004, a decline of 24 percent despite decreasing long distance rates during the same period.[44] Much of the decline in long distance minutes is often attributed to the growth of wireless subscribership, which has grown from 101 million in 2000 to 203 million in 2005[45], and the ability of carriers to offer "all you can eat" long distance plans.

B.2 Impact on Missouri End-user Rates

[44] "Trends in Telephone Service". Federal Communications Commission. Released June 21, 2005.

[45] "Local Telephone Competition: Status as of December 31, 2005". Federal Communications Commission. July 2006.

As current interstate and intrastate access rates can be greatly disparate, the majority of the MoPSC recommends the Commission explore whether it is reasonable for state commissions to maintain the ability to review individual carrier circumstances and establish additional transition or compensatory mechanisms as necessary to minimize rate shock to end users in rural, high cost areas without compromising the ultimate goal of creating a uniform intercarrier compensation regime.

Missouri Section 392.245(13) RSMo 2005 required the MoPSC to determine a statewide weighted average basic local rate as of August 28, 2005. MoPSC Staff calculated the statewide residential and business average basic local rate to be $13.77[46] based on information supplied by 98 companies providing basic local telecommunications services in Missouri. The residential statewide weighted average basic local rate was $11.62[47] and the business statewide basic local rate was $27.91[48]. These numbers are somewhat distorted since some companies only offer "bundled" service rates, while others offer stand-alone basic local service rates. Further, the statewide average rates include both urban and rural rates. In reality, according to currently effective tariffs, rural ILECs in Missouri charge

[46] This figure represents the weighted average tariffed rate for basic local telecommunications service plus the rate for mandatory extended area service calling plans.

[47] See footnote 46 above.

[48] See footnote 46 above.

residential basic local rates[49] ranging from $5.75 to $18.39 and business basic local rates ranging from $7.50 to $35.79. According to the sample bills submitted with the Plan, the basic monthly charge for rural residential service is calculated at $11. This estimate is approximately 40 percent higher than half of the rural residential basic local rates in Missouri. The assumptions put forth in Exhibit 1 are not consistent with actual rates in Missouri.

Proponents estimate nationwide revenue losses of approximately $6 billion after implementation of the Plan. In the past, the MoPSC has conducted several proceedings and workshops to analyze issues surrounding the implementation of a Missouri Universal Service Fund (MoUSF). In order to bring Missouri intrastate access rates to a level closer to interstate rates, it was estimated over $308 million in statewide telecommunications revenues would have to be replaced through end-user rate increases or subsidies assuming revenue neutrality should be guaranteed. It was also estimated that one Missouri rural ILEC would have to increase basic local rates by over $40 per month to off-set revenue losses as a result of moving intrastate rates to interstate parity.

The MoPSC Staff recently held an industry workshop to allow interested parties to present views on the Plan. The small, rural ILECs included in their presentation an analysis of the Plan using updated

[49] These rates represent the rate for basic local service only, without any additives for mandatory extended area service calling.

Missouri-specific, rural data. If revenue shortfalls are applied solely to end-user rates, the small rural ILECs estimate the following impact to their basic local rates:

- Average monthly impact - $20.73
- High end monthly impact - $58.44
- Low end monthly impact - $3.94

This discussion further supports the MoPSC assertion that the assumptions included in the Plan are not fully developed and are not all inclusive of the potential impact to end user bills. The discussion further demonstrates the MoPSC's position that avoidance of end-user rate shock should be of utmost importance in implementing an intercarrier compensation proposal.

B.3 Existing Expanded Calling Area Plans

The Plan appears to conflict with the Missouri Metropolitan Calling Area (MCA) plan. In 1992, the MoPSC established the MCA in response to a substantial number of end user complaints and dissatisfaction with exchange services originating from exchanges in areas which were once rural but have become part of the metropolitan areas of St. Louis, Kansas City and Springfield, Missouri. The MCA is a calling arrangement with end user rates increasing as each tier of exchanges moves farther from the central exchanges in each area. The intercarrier compensation arrangement for the

MCA is a bill-and-keep regime.[50] It appears the Plan preempts the MCA intercarrier compensation structure. For instance, Section II.E.6 describes the rules for Track 3 ILECs subject to EAS traffic agreements as follows:

> The foregoing general reciprocal compensation rules do not apply to existing reciprocal compensation arrangements for EAS traffic exchanged between a Track 3 ILEC and another ILEC, or to intercarrier compensation for tandem transit arrangements used to indirectly interconnect with a Track 3 ILEC in a mandatory local calling area arrangement or an optional local calling area arrangement.

This exemption only addresses EAS traffic between Track 3 ILECs and other LECs, but does not address EAS traffic exchanged between any other Tracks. Further, the Track 3 exemptions specifically refer the reader to additional exceptions in Section II.E.6.e, which states:

> Any carrier, including a tandem transit provider, may seek changes to tandem transit services used to indirectly interconnect a Track 3 ILEC with other ILECs in mandatory local calling areas and optional calling area arrangements. Any carrier retains its right to challenge proposed changes to these tandem transit services.

This section clearly allows any carrier to change tandem transit services with respect to EAS traffic, irrespective of Commission, state commission or court decisions to the contrary. Further, the Plan is not clear as to what jurisdiction, if any, will address the changes sought or the challenges to those changes.

[50] Report and Order. *In the matter of the establishment of a plan for expanded calling scopes in metropolitan and outstate exchanges.* Case No. TO-92-306, 2 Mo.P.S.C.3d 1, 1992 Mo. PSC Lexis 24 (December 23, 1992).

End users that participate in the MCA incur flat-rated monthly charges. By modifying the intercarrier compensation regime in the MCA, carriers will now charge (or incur) a unified rate for termination of traffic and a transit rate for indirect interconnection. Such a modification will undoubtedly result in increased end user rates or a move from a flat-rated end user service to a toll service for end users. This is yet another example of the Plan preempting state decisions, thus resulting in increased end user rates without incorporating those increases in the end user impact analyses. The Plan continues to tout the benefit to end users without analyzing the full effect of the Plan on the end user.

C. Opportunity to Raise SLC Rates to Recover Access Revenues

While the majority of the MoPSC is not opposed to adjusting end user rates for telecommunications services when such adjustments are justified, the majority suggests changes should be made to basic local rates instead of applied solely through an increase in the subscriber line charge, the USF surcharge and the Restructure Mechanism. Under the Plan, intercarrier compensation rates are purportedly reduced by $6 billion, while end user rates increase $6.9 billion. The majority of this increase, $4.7 billion, is realized through an increase in the subscriber line charge cap. Additional revenues are recovered as follows: $1.5 billion estimated Restructure Mechanism; $0.3 billion estimated increase in the USF high cost fund; $0.2 billion estimated increase in the low income fund and $0.2 billion estimated to fund the Early Adopter Fund. In other words, the entire $6.9 billion will be absorbed by the end-user through increased "governmentally approved or allowed" surcharges on telecommunications bills.

The MoPSC is not suggesting carriers should be denied the opportunity to recover lost revenues. However, by requiring carriers to recover a portion of those revenue losses from basic local service rates as opposed to recovering the revenue shortfalls from subsidies, the onus shifts to the telecommunications company. Further, end users in higher cost areas would contribute a more reasonable amount toward the recovery of the costs of serving such areas before spreading those costs across all end-users.

Section 254 of the Act requires telecommunications carriers to offer comparable service at just, reasonable and affordable rates. To achieve comparability in basic local rates, the majority of the MoPSC supports a national benchmark for local exchange network cost recovery. The Expanded Portland Group ("EPG"), in its intercarrier compensation proposal filed in this docket in November 2004, provided reasonable justification for establishing a benchmark in any framework, although its analysis specifically addresses an Access Restructuring Charge. For instance, the EPG says:

> To qualify for full [cost recovery] funding, the sum of the company's basic residential rate and its residential and single line business SLC must be greater than or equal to a "benchmark" level of $21.07.

The EPG further states:

> In order to qualify for full [cost recovery] funding, the sum of the carrier's basic residential rate and its residential and single line business SLC would need to be at or above a "benchmark" level of $21.07. If a carrier's combined rates were below this level, the carrier's draw [for cost recovery] would be reduced by the amount that such rates were below the benchmark, multiplied by the number of lines.

Finally, the EPG states:

> In creating [cost recovery] we recognize that some states have progressed more quickly than others in lowering intrastate access rates, and increasing cost recovery from end user rates and from state universal service funds. If the [fund] were to be implemented without some consideration of the degree to which states have rebalanced rates, then there could be an issue of equity among the states. States that had progressed further with rate rebalancing would be penalized, and states that had not would be unjustly rewarded unless some mechanism is implemented to account for this. To address this issue, the EPG Plan proposes that a "benchmark" price level be established for computation of [cost recovery]. Specifically, the EPG Plan proposes a benchmark of $21.07 per line be established for the sum of basic rate (including non-optional EAS charges) and the federal SLC. Companies where the sum of the basic and SLC was less than $21.07 would face a reduction of ARC funding that they might otherwise qualify for as a result of the revenue loss created by the establishment of unified intercarrier compensation rates.[51]

Without commenting on the appropriateness of the amount of $21.07, the majority of the MoPSC agrees[52] that by requiring carriers to increase basic

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[51] EPG's *Comprehensive Plan For Intercarrier Compensation Reform*, Nov. 2, 2004, (EPG Proposal), attached to Letter from Glenn H. Brown, EPG Facilitator, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed Nov. 2, 2004).

[52] MoPSC Commissioner Steve Gaw agrees that revenue recoveries should not be allowed through end user "governmentally approved or authorized" surcharges, but disagrees with any suggestion that basic local rates should be increased to achieve carrier revenue neutrality unless consumers are assured that there will be a corresponding decrease in long distance rates. While the Plan as presented guarantees revenue neutrality to telecommunications carriers, consumers are only guaranteed increases in surcharges or basic local rates. This Commissioner believes no plan should result in basic local rates for rural

local rates, less recovery is needed from what ultimately is portrayed as "governmentally approved or authorized" subsidies such as the subscriber line charge, the USF surcharge or the Recovery Mechanism.

C.1 SLC Increases Will Not Result in Consumer Benefits as Plan Supporters Claim

The Plan suggests end users will benefit from the proposed methods of revenue recovery. As explained below, the MoPSC asserts that such a claim is unfounded and unsupported.

Exhibit 2, "Economic Benefits from Missoula Plan Reform of Intercarrier Compensation" ("Benefits Paper"), attempts to quantify the likely economic benefits of the Plan. The Benefits Paper cites an end user expenditure survey in which economist Frank Wolak's model showed that a similar price proposal "appears to result in net consumer gains to the majority of the households in our sample". The Benefits Paper also cites a Southwestern Bell study indicating that about 45 percent of Southwestern Bell residential end users have experienced a net bill reduction under early implementation of the SLC program. Unfortunately, the citations reference studies from 1989 and 1996, indicating that the conclusions were drawn prior to the Act, prior to an environment where end users purchase bundles and prior to the decline in toll revenues.

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customers that are higher than the non-rural rates for similar services and calling scopes. Furthermore, funding for the USF should not be placed disproportionately on rural customers since doing so would be contrary to the purpose of the fund and the goals of the Act, namely ensuring more uniformity in telecommunications service regardless of geographic location.

Supporters of the Plan claim that concerns related to SLC increases will be mitigated by competitive pressures; that is, some carriers will not be able to increase their SLCs to the cap. The MoPSC suggests this concept is flawed since competition exists largely only for Track 1 carriers. Further, the Plan allows carriers to deaverage SLCs by varying them across study areas or customer segments as long as individual SLC amounts do not exceed the established caps. Deaveraging provides the opportunity for carriers to charge end users in less competitive areas a higher SLC, thereby providing an opportunity to subsidize lower rates in competitive areas.

D. "Switched Access" and "Reciprocal Compensation" Traffic for Purposes of Intercarrier Compensation

Proponents of the Plan argue that intercarrier compensation rates need to be unified to reduce arbitrage opportunities. The Executive Summary of the Plan states, "In concrete terms, the Plan unifies intercarrier charges for the majority of lines, and moves all intercarrier rates charged for all traffic closer together." The Plan also notes that each of the participants in the Missoula working group compromised on certain issues in order to produce the Plan and advance public policy goals. While the Plan purports to address many issues facing the telecommunications industry, the result is far from an industry consensus. In Missouri, less than 50 carriers out of approximately 500 ILECs, CLECs and IXCs have expressed support for the Plan. Further, it appears that Cingular is the only Missouri wireless carrier that supports the Plan and no Missouri cable companies are on record in support of the Plan.

Despite claims that the Plan unifies rates for the majority of lines, huge intercarrier compensation rate disparities will continue to exist. Since the Tracks are designated by access line count and the majority of ILEC loops fall to Track 1, it is easy to portray the Plan as unifying the rate for "the majority of lines". However, in instances where Track 3 intrastate access rates will move to interstate rates, there will continue to be no uniformity in intercarrier compensation. For instance, Track 3 Missouri carriers currently charge interstate local switching rates ranging from $.005745 to $.019153. Moving intrastate rates to the interstate level for Track 3 carriers in Missouri will still result in a minimum of six different intercarrier compensation regimes. This defies the objectives of unifying intercarrier compensation rates and moving "all intercarrier rates charged for all traffic closer together".[53]

<u>Interconnection Framework for Non-Access Traffic</u>

A. Local Number Portability Issues

The MoPSC supports the idea that all carriers provide local number portability. In November 2003, the Commission released its intermodal portability order[54] ("porting order") requiring porting from a wireline carrier

[53] Missoula Plan Executive Summary.

[54] Memorandum Opinion and Order and Further Notice of Proposed Rulemaking. *In the Matter of Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues.* CC Docket No. 95-116. Released November 10, 2003.

to a wireless carrier in certain circumstances. While the rules associated with the porting order are no longer effective, the discussion is relevant to the local number portability requirements of the Plan. In response to the porting order, several Missouri ILECs sought waivers of the requirements. The MoPSC conducted proceedings related to the costs associated with updating and/or replacing switches for LNP capabilities. Twenty-two carriers had switches that were not LNP capable. Of those carriers, six carriers were in the process of gathering bids to determine the cost of switch replacement. According to the 2004 data submitted in the twenty-two cases, the estimated average cost for switch replacement and/or software upgrade was $76,410. Recovery of costs associated with LNP is allowed through an end user surcharge over a five year period. As demonstrated by the MoPSC LNP proceedings, a requirement to mandate number portability as part of the Plan could result in additional cost imposed on non-LNP capable carriers. These costs would presumably still be recoverable from the LNP surcharge, a charge that is not included in the end user impact calculations associated with the Plan. This is yet another example of how the end user impact analysis is flawed.

B. The "Edge" Concept

Under the Plan, a carrier must permit other carriers to physically interconnect at its "Edges". An Edge refers to the location on a carrier's network where it receives traffic for routing within its network and where it performs the termination function for traffic received from other carriers. An

Edge can be an end office, an access tandem, a point of presence ("POP"), a trunking media gateway or a mobile switching center ("MSC"). Other points of interconnection ("POIs") are allowed as provided under Section 251(c)(2) of the Act and as negotiated or arbitrated; however, the Plan creates an obligation for an interconnecting carrier to pay transport from any non-Edge point of interconnection to the designated Edge.

The Plan states, "A carrier must designate at least one Edge in each LATA in which it receives traffic from other carriers."[55] This concept is contrary to existing Commission rules and various state decisions. For instance, 47 U.S.C. 51.305(a)(2) requires an ILEC to provide interconnection at *any technically feasible point* within the ILEC's network. This has been interpreted as allowing the CLEC (or interconnecting carrier) to designate the location of POIs, including a single POI per LATA, until such time as the ILEC demonstrates it is no longer technically feasible. Further, the MoPSC has determined that each carrier is responsible for transporting traffic on its side of the POI.[56] The Plan would allow the ILEC to determine the Edge(s), and require the interconnecting carrier to make substantial network

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[55]Missoula Plan page 45.

[56] Arbitrator's Report pages 6 and 10. Arbitration Order page 18. *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A").* Case No. TO-2005-0336, 2005 Mo. PSC Lexis 963 (effective July 11, 2005).

Final Commission Decision. *Petition of Socket Telecom, LLC for Compulsory Arbitration of Interconnection Agreements with CenturyTel of Missouri, LLC and Spectra Communications, LLC, pursuant to Section 251(b)(1) of the Telecommunications Act of 1996.* Case No. TO-2006-0299, available at http://psc.mo.gov/orders/2006/062706299.htm, pages 15-19 (effective June 30, 2006) (Commissioner Murray concurred).

modifications, establish transiting arrangements and pay transport from any other point of interconnection, presumably shifting additional costs to the interconnecting carriers' end users. This contravention of established Commission rules and preemption of state authority and decisions is yet another example of the inadequate and incomplete analysis of the Plan's effect on the end user.

C. Tandem Transit Service

The Plan allows for both direct and indirect interconnection. To satisfy the requirement that an interconnecting carrier must pay transport from a point of interconnection to the Edge, carriers are allowed to use a third party tandem transit service. Under the Plan, a carrier that provides tandem transit service on the eve of the Plan must continue to provide transit service pursuant to the rules in the Plan.

In numerous Missouri arbitration and interconnection agreement proceedings, it has been argued that transit traffic is neither governed by the Act, nor subject to negotiation and arbitration under the Act. The majority of the MoPSC, on numerous occasions determined that transiting is an obligation imposed by Sections 251(c)(2) and (3), with transiting service duties set out in Section 251(c)(2).[57]

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[57] Amended Order Rejecting Interconnection Agreement. *In the Matter of the Application of Missouri RSA No.5 Partnership d/b/a Chariton Valley Wireless for Approval of an Interconnection Agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri Pursuant to Section 252(e) of the Telecommunications Act of 1996.* Case No. TK-2005-0304, 2005 Mo. PSC Lexis 716 (May 19, 2005) (Commissioner Murray dissented).

The Plan requires transit service be provided "at rates, terms and conditions that are just, reasonable, and not unreasonably discriminatory." Beginning at Step 2, or at the beginning of the second year of the Plan, the Tandem Transit Service rate for reciprocal compensation traffic will be subject to commercial agreement with the rate capped at $0.0025 per MOU. This cap will increase annually by inflation starting at Step 5, or the fourth year of the Plan. The cap will be lifted at Step 4, or year 3, for Tandem Transit Service provided entirely within a metropolitan serving area. When provided in connection with jointly provided originating or terminating access, tandem switched transport will be deemed Tandem Transit Service for Track 1 and Track 2 carriers at various Steps and will be subject to the Tandem Transit Service. The Plan also establishes a traffic volume threshold, which when met by a carrier using the Tandem Transit services will result in a rate up to two times higher than the capped rate for all of that carrier's Tandem Transit services. In other words, contrary to the Act, much of the transit traffic will no longer be subject to interconnection agreements under Sections 251 and 252, thus no longer subject to state commission purview. Under the Plan, the Tandem Transit provider will have unfettered control over the rates, terms and conditions of Tandem Transit service.

Process for Obtaining an Interconnection Agreement

The Plan outlines mechanisms for establishing interim and formal interconnection agreements. The provisions are purportedly consistent with and build upon the principles in the Commission's *T-Mobile Order*.[58] The Plan claims to ensure that each carrier – regardless of type or classification – can obtain an agreement setting forth the terms of interconnection and reciprocal compensation. The interim agreement is designed to put an agreement in place while parties negotiate new, formal interconnection agreements.

The MoPSC questions whether this claim is consistent with Section 251(f) of the Act, which allows rural carriers an exemption from certain interconnection obligations. The MoPSC has yet to terminate the rural exemption for any Missouri carrier and rural Missouri ILECs have consistently argued they have yet to receive a "bona fide" request for interconnection. For instance, several Missouri rural ILECs have executed agreements with wireless carriers. The rural ILECs consider these agreements "traffic termination" agreements, not "interconnection agreements". According to the rural carriers, Section 251(b)(5) of the Act requires them to establish "reciprocal compensation arrangements" for the transport and termination of telecommunications. The rural carriers contend "traffic termination" agreements fall within that definition. In contrast, the carriers argue Section 251(c)(2) governs "interconnection", which has not occurred. The rural carriers fear that by referring to an agreement as an

[58] Declaratory Ruling and Report and Order, *Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs,* 20 FCC Rcd. 4855 (2005).

"interconnection agreement", the MoPSC will cause the rural carriers to waive their exemption under Section 251(f). The MoPSC has consistently found the rural carriers' concerns are misplaced. However, this example demonstrates the confusion potentially created by including within the Plan, a general process by which all carriers obtain an interconnection agreement.[59]

Comprehensive Solution for Phantom Traffic

The Plan defines phantom traffic as traffic consisting of calls that lack sufficient signaling information to enable intermediate and terminating providers to bill properly for intercarrier compensation. According to the Plan, phantom traffic hinders the creation of accurate billing records, conceals the identity of parties responsible for payment, and hampers the appropriate rating of calls. The MoPSC suggests this definition is insufficient. A more appropriate definition of phantom traffic would recognize that proper signaling information is necessary for non-compensable traffic as well as for compensable traffic. The MoPSC is concerned that past attempts to quantify phantom traffic have resulted in efforts to include non-compensable traffic as a part of the revenue alleged to be foregone as a result of the call termination of compensable traffic.

[59] Nunc Pro Tunc Order and Order Denying Motion for Correction. *Application of Peace Valley Telephone Company, Inc., for Approval of a Traffic Termination Agreement under the Telecommunications Act of 1996.* Case No. IK-2003-0223, 2003 Mo. PSC Lexis 1171 (September 17, 2003).

The Plan offers a procedure and guidelines for a yet-to-be determined set of rules. The Plan proposes an industry-driven framework with a Commission-imposed deadline, thereby allegedly providing the industry with an opportunity to balance the various interests that must be considered in designing the new process.

The Plan recommends the following framework to enable intermediate and terminating providers to properly bill.

1. Every originating provider must transmit the telephone number assigned to the calling party.
2. Every provider must transmit without alteration the telephone number information it receives.
3. Each provider that collaborates to complete a call shall work cooperatively to resolve violations within a 90-day timeframe.
4. A provider that connects via indirect interconnection must establish direct interconnection if it chronically violates the preceding rules.

The Plan outlines the framework to address phantom traffic issues, but offers little as a "comprehensive" proposal. The MoPSC cannot provide specific comment on this section of the Plan due to its vagueness and lack of clarity. However, the MoPSC offers input based on its experience addressing issues related to unidentified (phantom) traffic.

The MoPSC has successfully addressed issues related to unidentified (phantom) traffic in response to complaints that Missouri ILECs were not being compensated for the total amount of traffic sent to their networks for call termination. After a collaborative rulemaking process, including multiple workshops and industry meetings, the MoPSC adopted, in June 2005, the rules set forth in 4 CSR 240-29 ("Chapter 29") to govern signaling information and the exchange of call-detail records for "meet-point like" traffic.[60] Fundamentally, these rules place a requirement on originating tandem carriers to create a standard billing record for all compensable traffic and to provide the record in a timely manner and at no charge to terminating carriers. Chapter 29 rules also require all carriers to deliver the telephone number of the calling party to all carriers along the call path. Therefore, the terminating carriers can use the standard record to generate billing invoices and submit the invoice to originating carriers for payment, or alternatively a terminating carrier may use calling party number information to generate billing invoices. Likewise, Chapter 29 rules do not preclude two carriers from mutually agreeing to exchange other types of billing records. Chapter 29 prohibits unscrupulous carriers from stripping the correct telephone number and inserting a jurisdictionally improper telephone number into the call path or billing records. Finally, Chapter 29 allows blocking of traffic as a last resort solution when it is delivered in violation of MoPSC rules. Chapter 29 leaves intact the traffic and billing methods employed in the interstate interexchange network, and only addresses that part of the telecommunications network designed and used by telecommunications companies for the purposes of originating, terminating and transiting local, intrastate/intraLATA, interstate/intraLATA, and wireless

[60] The traffic governed by 4 CSR 240-29 consists exclusively of traffic originated by the use of "Feature Group 'C'" protocol. "Meet-point like" billing guidelines were established for such traffic.

telecommunications services that originate via the use of feature group C protocol. InterLATA landline originated traffic is prohibited from traversing the local network covered by Chapter 29. In this manner, Missouri already has in place a comprehensive solution to the phantom traffic issues which the Plan purports to address. Other than to open up the local network to termination of interstate landline originated calls, the Plan is silent as to details of how such interstate landline originated calls are to be treated.

Through the implementation of Chapter 29, the MoPSC has eliminated a backlog of cases alleging instances of phantom traffic. The only issue remaining for the MoPSC's determination is whether calling party number ("CPN") should be included as part of the automatic message account ("AMA") billing record. The Plan's current lack of detail makes it difficult to comment on any immediate concerns with the "comprehensive solution for phantom traffic", but the MoPSC has grave concerns that its efforts to eliminate unidentified traffic will be undermined by the proposal of the few proponents of the Plan.

<u>Other Mechanisms for Recovery of Interstate and Intrastate Revenues</u>

A. Restructure Mechanism

The Plan creates a revenue recovery mechanism designed to replace most of the intercarrier revenues lost by carriers to the extent those revenues are not recovered through increased SLC revenues or restructured intercarrier compensation rates. Much like the SLC, carriers can deaverage their Restructure Mechanism dollars, once again providing the opportunity to shift dollars between competitive and non-competitive exchanges allowing for further disparity between areas that have competition and areas that do not have competition.

Through modeling assumptions, supporters of the Plan estimate a Restructure Mechanism fund of $1.5 billion. The Working Group on Reform of the Universal Service Contribution Methodology issued a statement that, "As the intercarrier compensation rules are reformed, the revenues carriers receive from universal service funding and the Restructure Mechanism will be more important than ever and will, in many cases, have to be increased. It is therefore essential that any intercarrier compensation reform plan ensure that the universal service and Restructure Mechanism contribution methodology is designed to produce sufficient, stable, and predictable support – even in an unpredictable and dynamic telecommunications market."[61] While the Working Group promotes a plan that ensures sufficient, stable and predictable support, the Plan fails to address key problems associated with the current contribution methodology and the current lack of sustainability of the USF. Since fiscal year 1999, the high cost support mechanism has doubled, providing the following approximate support amounts: $1.7 billion in 1999; $1.9 billion in 2000; $2.6 billion in 2001; $2.8 billion in 2002; $3.3 billion in 2003 and $3.4 billion in 2004.[62] The proponent's efforts to call the

[61] Missoula Plan, Appendix B.

[62] Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking. *In the Matter of Comprehensive Review of Universal Service Fund Management, Administration,*

Restructure Mechanism something other than a universal service support mechanism does not mitigate the concerns associated with maintaining a sustainable fund.

While the Missoula Plan seeks to preserve carrier revenues through the RM, the Plan does not explain how the Restructure Mechanism will be funded. The Plan is vague on the appropriate contribution methodology for the RM, indicating the methodology would be similar to that of the USF. The Commission has previously sought comment on the appropriate contribution methodology. Consistent with previous comments, the MoPSC recommends any changes to the current contributions methodology be made in a manner that is non-discriminatory, competitively neutral, and easily administrable. The MoPSC is also concerned that the $1.5 billion dollars calculation is not cost justified and that the Plan does not include any contingency for miscalculation of the size of the RM.

A.1 Calculation of the Restructure Mechanism

The Plan sets forth various formulas for determining the amount of Restructure Mechanism support carriers will receive. According to the AT&T Modeling Assumptions submitted with the Plan, the estimated $1.5 billion RM fund includes $320 million for Track 1 carriers, $548 million for Track 2 carriers, $458 million for Track 3 carriers, and $125 million for CLECs. Section VI.A.2.a of the Plan states, "Restructure Mechanism dollars will be

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and Oversight, et al. WC Docket No. 05-195, et al. Released June 14, 2005. par. 44 and fn 99.

available to other carriers in circumstances to be determined in the future." (italics added) This statement is yet another example of the uncertainty within the Plan, further contributing to the problematic and questionable assumptions.

For the various Tracks, price cap carriers determine a weighted average access rate through specific calculations. Because cost recovery from the RM is calculated on a per-line basis, the loss of a line results in a loss of related RM support. Unlike Track 1 carriers, a Track 2 price cap carrier that loses lines does not lose RM support during Steps 1 through 3, or from the effective date of the Plan through the second year of the Plan.

Rate-of-return carriers determine RM support by comparing existing revenues with the revenues the carrier will receive under the Plan. Any shortfall will be recovered through the RM. The RM for rate-of-return carriers will be subject to a true up using a specific Plan formula. It does not appear that price cap carriers are held to the same sort of true-up standard. Further, it is not clear that there is any accountability, whether for price cap or rate-of-return carriers, beyond the carriers' following the various Plan formulas. The MoPSC urges the Commission to hold carriers accountable for any support received as a result of the Plan by implementing an audit process designed to review carrier lines and associated calculations.

B. Changes to Existing Universal Service Mechanisms

As previously discussed, NARUC established principles outlining specific universal service and consumer protection goals. The NARUC principles also adopted a prerequisite for plan implementation, whereby, "The FCC should identify, quantify, and evaluate the total of all federal high cost universal service payments received by each company today. The federal universal service support mechanisms should be revisited as an intercarrier compensation plan is implemented to ensure that telecommunications services remain accessible and affordable to all Americans." The Plan not only ignores these goals but exacerbates unsustainable, unsupportable increases in the Universal Service Fund. The USF is approximately $7 billion. As the Commission has noted, there is widespread agreement that the USF is experiencing significant strain with high cost disbursements increasing almost $2 billion over the past five years.[63] Under the Plan, it is estimated that USF-like disbursements will increase by $2.2 billion, or approximately 32 percent and that the assessment factor will reach a level in excess of 13 percent.

B.1 Early Adopter Fund

The Plan establishes a new USF program, the Early Adopter Fund ("EAF"). The Plan supporters estimate a fund size of at least $200 million, "or whatever greater amount it determines to be an appropriate percentage of State access reduction funds that should be covered by the Early Adopter Fund."[64] While the MoPSC recognizes that the Plan supporters continue to

[63] Report and Order and Notice of Proposed Rulemaking. WC Docket 06-122. Released June 27, 2006.

[64] Missoula Plan page 76.

work with State commissions to further define the Early Adopter Fund, the EAF adds significant costs to the Plan that are not properly quantified, justified or detailed.

B.2 Low Income Fund

The MoPSC supports efforts to insulate low-income consumers from arbitrary rate increases. The Plan clearly states that lifeline support for low-income consumers will be adjusted automatically to off-set changes in SLC rates. However, the Plan appears silent on adjusting lifeline support to off-set increases as a result of the RM or EAF.

B.3 Changes to Existing Universal Service Mechanisms

Under the Plan, the High Cost Loop Fund ("HCLF") will be adjusted based on the current nationwide average cost per loop for rural telephone companies. The adjusted HCLF will be increased in three equal steps over 24 months. The Plan also establishes a non-rural HCLF that will be available to price cap covered rural telephone companies ("CRTCs"), in other words, ILECs that meet the definition of "rural telephone company" or qualify as a "two percent carrier". This is a new support mechanism for non-rural carriers and may be inconsistent with the Commission's methodology for providing support to non-rural carriers.

The Plan also modifies the existing safety valve support mechanism for high cost loop support in exchanges acquired by rural ILECs and establishes a new, Safety Valve II support mechanism. The supplemental safety valve support mechanism provides additional revenue recovery for carrier acquisitions, based on a showing of actual investment in the acquired exchanges.

The MoPSC reiterates its position that under the Plan, instead of achieving the Commission's goal of attaining a sustainable USF, the proposed modifications and additions to the fund only serve to further inflate the USF without providing any cost justification to support the change in funding.

Incentive Regulation Plan

A. Election of Incentive Regulation

CRTC study areas that are currently regulated on a rate-of-return basis can be replaced with incentive regulation under the Plan, shifting cost-based, rate-of-return revenue formulas to per-line revenue formulas. The Plan purports to allow carriers to realize financial gains from increased efficiency and permits greater flexibility in special access rates. Following election of incentive regulation, prices and support payments shall be set at levels that permit carriers to recover the same amount of revenue per subscriber line as immediately prior to the election. If intercarrier compensation rates, as established in the Plan, are insufficient to recover revenue losses, carriers are permitted to adjust the per line support obtained from the RM. Special access rates will be determined on a per-study-area basis and will reflect an 11.25 percent return on investments. Interstate special access rates will be subject to price caps with annual productivity-based adjustments equal to the rate of inflation. Separate baskets will be established for broadband and non-broadband special access, with annual increases on individual rate elements not to exceed 10 percent. The Plan allows Track 2 carriers to demonstrate the ability to make a mid-course correction for recovery of special access revenue upon an appropriate showing that special access revenues are under-recovered. In the Pricing Flexibility Order, the Commission granted incumbent LECs subject to price cap regulation for interstate access services increased flexibility to set special access rates as part of a market-based approach to drive interstate access charges toward the costs of providing those services.[65] A primary mechanism by which the Commission has sought to accomplish its deregulatory goal is by granting carriers progressively greater freedom to set their own rates commensurate with the level of competition that has developed.[66] The Plan would take this existing pricing flexibility further by allowing carriers pricing flexibility not to exceed 10 percent per year for special access services without any correlation to the competitive nature of the market. Further, the Plan would guarantee an 11.25 percent return on investment in perpetuity without any analysis as to the appropriateness of such a return.

In summary, as clearly demonstrated in these comments, the Plan fails on several levels to meet the objectives of the Act, the Commission and the NARUC's principles. Further, the proponents have not provided sufficient justification to support such a radical change in the current intercarrier

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[65] *See Pricing Flexibility Order*, 14 FCC Rcd 14221.

[66] Order on Remand. *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers.* WC Docket No. 04-313 and CC Docket No. 01-338, respectively. Released February 4, 2005. Paragraph 61.

compensation regime. The MoPSC urges the Commission to consider the NARUC Plan[67] in lieu of the intercarrier compensation plan filed on June 24, 2006.

Respectfully submitted,

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[67] NARUC proposal filed May 18, 2005.